SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~712~~ 38

JULIUS SALSBURG,

*Appellant,*

*vs.*

STATE OF MARYLAND,

*Appellee*

**MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM AND BRIEF IN SUPPORT THEREOF.**

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JULIUS SALSBURG,

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**MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM**

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*To the Honorable, the Justices of the Supreme Court of the United States:*

The State of Maryland, Appellee in the above entitled cause, respectfully moves this Honorable Court to dismiss the above entitled appeal or, in the alternative, to affirm the judgment of the Court of Appeals as to the Appellant Julius Salsburg, and for reason in support of said Motion, respectfully represents that the appeal fails to present any substantial Federal question.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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## No. 712

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JULIUS SALSBURG,

*Appellant,*

*vs.*

STATE OF MARYLAND,

*Appellee*

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## BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

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### Statement of Facts

This is an appeal from a final judgment of the Court of Appeals of Maryland, entered on February 5, 1951, affirming a judgment of the Circuit Court for Anne Arundel County. The opinion of the Court of Appeals is reported in 94 A. 2d (Adv. Shts.) 280.

The proceedings originated in the Circuit Court for Anne Arundel County where the Appellant and two other persons by the names of Joseph Rizzo and William Nicholson were convicted of bookmaking, which is a misdemeanor by statute. See Section 306 of Article 27 of the Annotated Code of Maryland (1951 Ed.). The Appellant and the two per-

sons convicted with him appealed to the Court of Appeals, where they contended:

(1) That their conviction was based upon evidence secured by an illegal search and seizure, and

(2) That the statute under which the evidence was held admissible is unconstitutional as violative of the Equal Protection Clause, inasmuch as it applied to only three of the twenty-three Counties of the State.

The Court of Appeals held that, inasmuch as Rizzo and Nicholson had demonstrated no interest in the premises which were searched, they could not, under previous decisions of that Court, complain of the illegal search and seizure. The Court of Appeals found that the Appellant Salsburg had demonstrated an interest in the premises as lessee, and ordered re-argument as to him on the constitutional question. See *Rizzo, et al.* v. *State*, — Md. —, 93 A. 2d (Adv. Shts.) 280.

The Appellee readily concedes that the evidence introduced against the Appellant was secured by an illegal search and seizure. The Common Law Rule, in the State of Maryland, is that in prosecutions for both misdemeanors and felonies, evidence otherwise admissible will not be rejected because illegally obtained. See *Meisinger* v. *State*, 155 Md. 195, 141 A. 536; *Lawrence* v. *State*, 103 Md. 17, 63 A. 96. Chapter 194 of the 1929 Laws of Maryland changed this rule in cases of misdemeanors. The statute has been amended a number of times since its enactment, and a number of Counties have been excepted from its provisions in the case of certain gambling violations. The Act, as now codified in Section 5 of Article 35 of the Annotated Code of Maryland (1951 Ed.) reads in part, as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been

procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State * * *. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gambling', or in any laws amending or supplementing said sub-title."

## Jurisdictional Statement

The Appellee adopts the jurisdictional statement heretofore filed by the Appellant.

## Basis of Appeal

The Appellant contended in the Court of Appeals of Maryland and urges in this Court that the exception made to Section 5 of Article 35, *supra*, when applied in trials for violation of gambling laws in Anne Arundel County, serves to deprive a person accused of such violation of the equal protection of the laws and of the due process of law which is guaranteed by the 14th Amendment to the Constitution of the United States.

## ARGUMENT

**The partial exemption of Anne Arundel, Wicomico and Prince Georges Counties from the provisions of Section 5 of Article 35 of the Code does not violate the due process clause of the 14th Amendment to the Constitution of the United States.**

The history of the Maryland law relating to the admissibility of evidence secured by an illegal search and seizure may be summarized as follows:

1. Prior to the enactment of Article 35, Section 5 of the Code, the Court of Appeals held that evidence, otherwise

admissible, would not be rejected because illegally obtained. *Meisinger* v. *State, supra,* and *Lawrence* v. *State, supra.*

2. Section 5 of Article 35, *supra,* made evidence in trials for misdemeanors inadmissible when secured by an illegal search and seizure.

3. The rule in cases of felonies remains the same as it was prior to the enactment of Section 5 of Article 35. *Marshall* v. *State,* 182 Md. 379, 35 A. 2d 115; *Delnegro* v. *State,* — Md. —, 81 A. 2d 241, 244.

4. Amendments made to Section 5 of Article 35, *supra,* exempt from its provisions prosecutions for violations for certain of the gambling laws when the prosecutions occur in Anne Arundel, Wicomico and Prince Georges Counties.

5. The Court of Appeals of Maryland, in the decision presently being appealed, held that the amendments made to Article 35, Section 5, *supra,* serves to reinstate the common law rule in prosecutions for violation of certain of the gambling laws in Anne Arundel County, so that evidence obtained by an illegal search and seizure in said County, if otherwise admissible, will not be excluded.

The Appellant in the closing paragraphs of his argument, under the heading "The Questions are Substantial", suggests that the exemption contained in Article 35, Section 5, *supra,* are a "negative direction", and therefore an "affirmative sanction" to law enforcement officers in the exempted Counties to conduct illegal searches and seizures. He does not question the well settled principle that the 4th and 5th Amendments to the Federal Constitution are limitations on Federal power which do not apply to the States, and that, in a prosecution in a State court, the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. *Stefanelli* v. *Minard,* 342 U. S. 117; *Wolf* v. *Colorado,* 338 U. S. 25; *Adams*

v. *New York*, 192 U. S. 585; *Johnson* v. *State*, 193 Md. 136, 66 A. 2d 504. However, he relies upon dictum in the case of *Wolf* v. *Colorado*, *supra*, where this Court indicated that "were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment". From the context, it is clear that this Court, in using the term "guaranty of the Fourteenth Amendment", was referring to the due process clause of that Amendment.

There is no affirmative sanction by the Legislature in the present statute. The statute presently in question is in no way similar to the type condemned in a case such as *Ex Parte Rhodes*, — Ala. —, 79 So. 462, where the statute, as construed by the Court, affirmatively authorized arrest and search and seizure in misdemeanor cases where the offense was not committed in the presence of the officer. Here, the statute does not affirmatively authorize the police to conduct unreasonable searches and seizures. Rather, it abrogates the legislatively created rule of evidence and thereby incidentally reinstates the common law rule. Should an officer conduct an unreasonable search and seizure under the mistaken belief that he had the authority to do so under Section 5 of Article 35, *supra*, he could undoubtedly be held personally liable. See *Wolf* v. *Colorado*, *supra*, at page 29 of 338 U. S. where it is observed that although evidence secured by an unreasonable search and seizure may be held admissible by the State court, yet the common law provides action for damages against the searching officer.

The Appellant in his brief makes mention of the fact that the trial court remarked that under Section 5, the officers had a "right" to conduct the search and seizure. This statement was erroneous and the Appellee has never con-

tended that the statute confers such a right nor does it so contend now. The Court of Appeals of Maryland certainly suffers from no such misapprehension as is manifest from its opinion in the present case. See *Salsburg* v. *State, supra,* 94 A. 2d (Adv. Shts.) at page 282.

In the case of *Wolf* v. *Colorado, supra,* this Court indicated that the exclusion of evidence illegally obtained in Federal prosecutions is not an explicit requirement of the 4th Amendment, but rather is a rule of the Supreme Court, created to implement that Amendment. This Court went on to suggest that perhaps Congress has the power, through appropriate legislation, to negate this judicially created rule. Certainly, in view of this Court's condemnation of a State statute which would "affirmatively sanction police incursion into privacy", this Court must have meant that Congress possibly has the power to change the exclusionary rule as applied by the courts, and not to affirmatively direct illegal searches and seizures. It is submitted that Section 5 of Article 35, *supra,* does no more than the converse of what this Court suggested Congress may have the authority to do, viz. it abrogates a legislatively created rule of evidence and thereby reinstates the judicially created rule.

Further, Section 5 of Article 35, *supra,* merely reinstates the rule of evidence which this Court, in the case of *Wolf* v. *Colorado, supra,* and in other cases has held does not violate the due process clause of the 14th Amendment. It is submitted that the Appellant's contention really resolves to the difficult balancing of the right of persons to be secure in their privacy against the social need that the criminal law shall be enforced. This Court has decided that the balancing of these opposing interests is for the States, at least in the absence of action by Congress. See the opinion of Mr. Justice, then Judge, Cardozo in *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585.

**The partial exemption of Anne Arundel County from the provisions of Section 5 of Article 35 of the Code does not deny residents of that county the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.**

The Appellant admits the power of the State Legislature to enact laws which classify. He urges, however, that there must be a reasonable basis for the classification, and that where the classification is manifestly and obviously arbitrary and unreasonable, it is unconstitutional under the equal protection clause. He contends that the classifications made by the statute in question as to territory (Anne Arundel County) and as to crime (certain gambling violations), are both arbitrary. The Appellee contends that the classification is not obviously arbitrary, that the statute merely prescribes a rule of evidence, and that a wide latitude has been allowed the States in regulating the administration of justice and systems of procedure in State courts.

That the type of territorial classification attempted by Section 5 of Article 35, *supra*, is fully constitutional and valid seems established by a line of cases, beginning with *Missouri* v. *Lewis* (*Bowman* v. *Lewis*), 101 U. S. 22. There, a law of the State of Missouri was upheld which allowed an appeal to the Supreme Court of that State from any final judgment of any Circuit Court where certain Counties were excepted from the provision, and a separate appeal court provided for them. This Court there said:

> "* * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which

is enjoyed by other persons or other classes in the same place and under like circumstances.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

Similarly, in the case of *Hayes* v. *Missouri*, 120 U. S. 68, a statute was upheld which provided that in all capital cases excepting cities of over one million inhabitants, the State shall be allowed eight peremptory challenges to jurors, and in such cities, shall be allowed fifteen peremptory challenges.

The case of *Chappell Chem. Fertilizer Co.* v. *Sulphur Mines Co. of Virginia*, 172 U. S. 474, held that the rule in Baltimore City which requires all civil cases to be tried without a jury, unless a jury trial is specifically requested, is constitutional, as not denying residents of Baltimore City the equal protection of the laws.

Thus, the case of *Mallett* v. *North Carolina*, 181 U. S. 589, held that a statute which granted the State an appeal from the granting of a new trial to an accused in criminal cases was not a denial of the equal protection of the laws when this appeal was given in one district of the State and not in another. Thus, in *Ocampo* v. *United States*, 234 U. S. 91, this Court upheld a statute which was attacked as denying the equal protection of the laws which denied to inhabitants of Manila the right to a preliminary examination in criminal cases which right was accorded to all other persons in

the Philippine Islands. Here, as in other cases involving this question, the Court was careful to point out that what was allowed under the statute did not involve a denial of due process of law. The same is true, of course, relative to the admission of evidence secured by an unreasonable search and seizure. For other cases involving the application of the principle announced in *Missouri* v. *Lewis, supra.* See *Brown* v. *New Jersey*, 175 U. S. 172; *Gardner* v. *Michigan*, 199 U. S. 325; *Graham* v. *West Virginia*, 224 U. S. 616; *Ohio* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74.

There have been several cases in which this Court has applied the doctrine of *Missouri* v. *Lewis, supra*, since the decision in 1930 of *Ohio* v. *Akron Metropolitan Park Dist., supra.* In these cases this Court has disposed of the question of denial of the equal protection of the laws in per curiam opinions in which it referred to *Missouri* v. *Lewis, supra.* These cases are *Morris* v. *Alabama*, 302 U. S. 642 and *Jannett* v. *Hardy*, 290 U. S. 602.

It is to be noted that with the single exception of *Hayes* v. *Missouri, supra*, this Court, in the cases above discussed did not go into the question of the reasonableness of the classification made and, in fact, did not even mention the presumption of constitutional validity.

Nor is the classification as to subject matter such as to preclude the assumption that the classification rests upon some rational basis within the knowledge of the legislators. The case of *Semler* v. *Oregon*, 294 U. S. 608 involved a statute which regulated advertising by persons engaged in the profession of dentistry. The plaintiff, a dentist who had been found guilty of violating the statute contended that the statute was arbitrary in that it singled out one profession for regulation. This Court disposed of that contention as follows:

> "* * * Nor has plaintiff any ground for objection because the particular regulation is limited to dentists

and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 S. Ct. 644; Miller v. Wilson, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 S. Ct. 342, L. R. A. 1915F, 829; Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 43, 70 L. ed. 818, 821, 46 S. Ct. 384; Dr. Bloom Dentist v. Cruise, 288 U. S. 588, 77 L. ed. 967, 53 S. Ct. 320."

The Appellant complains that both classifications made by the present statute are obviously unreasonable. It is well settled where laws are attacked as violating the equal protection requirement, there is presumption in favor of the legislative classification, and that if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts, when the law was enacted, must be assumed. See *Metropolitan Insur. Co.* v. *Brownell*, 240 U. S. 580, 584; *Whitney* v. *California*, 274 U. S. 357, 370; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 510; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 465.

A number of reasons could be conceived to justify the classification made in Section 5. One of these was suggested by the Hon. Wm. L. Henderson, Associate Judge of the Court of Appeals of Maryland, at the time of the original argument of this case before that Court. He suggested that the Legislature could take cognizance of the fact that the heavy penalties being imposed by the Criminal Court of Baltimore in gambling cases were driving more gamblers into Anne Arundel County, and that this was causing much concern in that County. Anne Arundel County is adjacent

to Baltimore City. The classification as to gambling finds a rational basis in the fact that it has recently been much publicized that not only does gambling have an evil effect upon persons who are its victims, but also that persons who conduct the gambling enterprises are corrupting our political institutions. In the case of *Brown* v. *New Jersey, supra,* this Court said, at page 177 of 175 U. S.: "* * * A State may make different arrangements for trials under different circumstances *of even the same class of offenses* * * *." Certainly, therefore, if there may be a discrimination within the same class of offenses, there is no reason why the Legislature could not discriminate between different classes of offenses.

The Court of Appeals of Maryland, in its opinion, does not attempt to discover a rational basis for the exceptions in Section 5. However, the Court did state the rule that a classification is presumed to be reasonable as follows:

> "* * * The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369."

It is submitted that the classification made by Section 5 is not manifestly arbitrary and that the Appellant has not sustained the burden of showing that "it does not rest upon any reasonable basis." The Appellee has above suggested a basis for the classification which is certainly reasonable.

## Conclusion

It is respectfully submitted that, for the foregoing reasons, the Appellee's Motion to Dismiss the Appeal or, in

e Alternative to Affirm the Judgment of the Court of ppeals of Maryland, should be granted.

Respectfully submitted,

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